IN THE IOWA SUPREME COURT

No. 15-1373

TSB HOLDINGS, L.L.C.
and **911 N. GOVERNOR, L.L.C.**

Plaintiffs-Appellants,

v.

CITY OF IOWA CITY,

Defendant-Appellee.

APPEAL FROM THE IOWA DISTRICT COURT
FOR JOHNSON COUNTY
THE HONORABLE MITCHELL E. TURNER, JUDGE

DEFENDANT-APPELLEE CITY OF IOWA CITY'S FINAL BRIEF

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ROUTING STATEMENT

Defendant-Appellee City (hereinafter "City") requests transfer to the Court of Appeals because this case turns on the application of general existing legal principles. Therefore, transfer is appropriate. Iowa R. App. P. 6.1101(3)(a).

STATEMENT OF THE CASE

Nature of the Case

The City and the court have been down this road before. In 1978, the City was sued for rezoning the properties involved in these two lawsuits from a high-density multi-family zone to a medium-density multi-family zone. The result of that litigation was a decision by the Iowa Supreme Court: *Kempf v. City of Iowa City*, 402 N.W.2d 393 (1987). In *Kempf*, the current Plaintiffs' predecessors-in-interest, Wayne Kempf. et al., were attempting to develop property located in Iowa City at a density the community felt was incompatible with the surrounding neighborhood. *Kempf*, 402 N.W.2d at 397. The Iowa City City Council agreed and rezoned the property to a less dense zoning designation. *Id.* The Iowa Supreme Court, however, determined that the City's rezoning was illegal spot zoning. *Id.* at 401. The supreme court's remedy was to allow the City's amended zoning designation to remain, but enjoin the City from interfering with the owner's development plans. *Id.* One thing the supreme court did not do was order that the City was enjoined from rezoning the Kempf property. *Id.* Quite the opposite, the

Kempf court actually reversed the district court order invalidating the City's rezoning. *Id.*

Fast forward to 2013. The City again rezoned the subject land, now owned by Plaintiffs TSB Holdings, L.L.C., and 911 N. Governor, L.L.C. (hereinafter collectively "TSB" or "Plaintiffs"), and was again sued, giving rise to the current litigation. The illegality alleged by Plaintiffs was that the City violated the *Kempf* rulings by rezoning their properties.

The district court determined the *Kempf* decisions in no way prohibited the City from rezoning the subject properties, and likewise, the City's rezoning did not amount to "interference" that violated the *Kempf* orders, even if the rezoning did ultimately lead to the denial of a site plan. The district court recognized that the *Kempf* decisions themselves anticipated the City would rezone the properties: "Further development or redevelopment of the property beyond that contemplated by Kempf as shown by this record and noted in this opinion, whether carried out by Kempf or future owners, *will be subject to the amended ordinances* . . . ." *Kempf*, 402 N.W.2d at 401; App. at p. 179 (emphasis in district court decision).

The district court dismissed all of Plaintiffs' claims on summary judgment. After Plaintiffs filed a Rule 1.904(2) motion, in which they requested clarification as to whether the court had dismissed a purported takings claim, the court found

Plaintiffs failed to meet notice pleading requirements for any such claim. The district court reiterated that it dismissed Plaintiffs' entire case.

Course of Proceedings and Disposition in District Court

On February 18, 2013 Plaintiffs filed a Petition for Declaratory Judgment and Temporary Injunction against the City of Iowa City. (App. at pp. 134-159). In their Petition for Declaratory Judgment, Plaintiffs alleged the City was attempting to rezone certain portions of their properties and that the rezoning would prevent them from building apartment buildings they desired. (App. at pp.136-137). Based on their interpretation of the *Kempf* decision and the district court's 1987 remand order in *Kempf*, Plaintiffs requested "a declaratory decree adjudging the City *may not alter the zoning of the property* . . . ." (App. at p. 137) (emphasis added).

On March 19, 2013, the Iowa City City Council passed the anticipated rezoning ordinance changing the zoning for some of Plaintiffs' property to a designation that would not allow the construction of high-density multi-family apartment buildings. (App. at pp. 14-16).

In response, on April 17, 2013, Plaintiffs filed a Petition for Writ of Certiorari alleging the City's rezoning was illegal, and asking that "Defendant's rezoning of the property be annulled and declared void." (App. at p. 162).

The district court consolidated Plaintiffs' declaratory judgment and certiorari cases against the City on July 16, 2014. (App. at pp. 331-332). Yet another action

filed by Plaintiffs, *TSB Holdings, L.L.C. and 911 N. Governor, L.L.C. v. Iowa City Board of Adjustment*, CVCV076128 (Johnson County), remained a separate case despite Plaintiffs' motion to consolidate that action with the cases against the City. (*Id.*; App. at pp. 170-182). The Board of Adjustment case involved the Iowa City Board of Adjustment's denial of Plaintiffs' site plan applications for apartment buildings due to their incompatibility with the new zoning passed by the City Council.

The City and the Plaintiffs both filed motions for summary judgment on Plaintiffs' claims that the City's rezoning was illegal. (App. at pp. 247, 249). The district court granted the City's motion and denied Plaintiffs' motion. (App. at pp. 170-182). It held "Plaintiffs' request for a declaratory judgment that the City may not alter the zoning of the property violates public policy" and rejected Plaintiffs' contention that the City's rezoning amounted to "interference" that would violate the *Kempf* rulings. (App. at p. 180).

In a Rule 1.904(2) motion, Plaintiffs alleged they had also made a takings claim, and asked the court to clarify whether it had dismissed their purported takings claim. (App. at pp. 165-169). The district court enlarged its ruling to "specifically find that Plaintiffs did not meet notice pleading requirements for their purported takings claim." (App. at p. 184). The district court stated "[i]t was the Court's intent . . . that all of Plaintiffs' claims - Plaintiffs' entire case - in

EQCV075292 and CVCV075457 would be disposed of by the Ruling." *Id.* Plaintiffs' appeal. (App. at p. 336).

Facts

In *Kempf*, the Iowa Supreme Court ruled:

> [W]e hold that ordinances numbered 78-2901 through 78-2906 may apply to the Kempf property, provided, however, that Kempf shall be permitted to proceed with the development of apartment buildings, as shown by the record in this case, to the extent that such buildings conform to the ordinances in effect prior to the 1978 rezoning, with the exception of the controversial LSRD ordinance, which we hold inapplicable in this situation. The city shall be enjoined from prohibiting this use of the property by Kempf. Further development or redevelopment of the property beyond that contemplated by Kempf as shown by this record and noted in this opinion, whether carried out by Kempf or future owners, will be subject to the amended ordinances above designated.
>
> Support for this disposition, which neither leaves the property unzoned nor caused this court to assume legislative functions, is found in *Schwartz v. City of Flint*, 426 Mich. 295, 395 N.W.2d 678, 690-93 (1986).
>
> To the extent the 1978 zoning ordinance was declared void by the district court, the district court's ruling is reversed.
>
> We affirm in part, reverse in part, and remand to the district court for a disposition in conformance with this opinion.

Kempf v. Iowa City, 402 N.W.2d 393, 401 (Iowa 1987).

On August 26, 1987, the district court entered "Supplementary Orders on Remand" in the *Kempf* case, stating, in relevant part:

> The owner or owners of said properties, and their successors and assigns, shall be permitted to develop those properties with multiple

> dwellings (apartments) in accordance with the provisions applicable to the R3B zone in effect on May 30, 1978, prior to the rezoning of said real estate which was finalized on June 28, 1978.
>
> It is further ORDERED that the City's Large Scale Residential Development Ordinance shall not apply to development of those properties. The City is and shall be enjoined from interfering with development of those properties as herein provided.
>
> Once a use has been developed or established on any of the above-described properties, further development or redevelopment of that property shall be subject to the zoning ordinances in effect at the time such further development or redevelopment is undertaken.

(App. at pp. 292-294).

In the decades following these court rulings, the public and City continued to have concerns about the potential for Plaintiffs' properties to be developed at densities incompatible with the neighborhood surrounding the properties. (App. at pp. 296, 301). Plaintiffs' properties are located in the middle of an older, largely single-family residential neighborhood zoned for medium density, single-family uses. (Return to the Writ (CVCV075457), pp. 2-7).

In 2008, Iowa City adopted a comprehensive plan entitled the *Central District Plan*, which details long-range planning goals for the Central District of Iowa City, including Plaintiffs' properties. *See* Iowa Code §414.3 (requiring zoning decisions to be made in accordance with a city's comprehensive plan); (App. at p. 296). The *Central District Plan* was the final product of over two years of planning, researching, and consulting with the public regarding the strengths,

weaknesses, opportunities and threats facing Plaintiffs' neighborhood. (App. at pp. 296, 301). The area was considered to be one in need of assistance from the City to stabilize the balance between various housing types and mix of residents. (App. at pp. 296, 301). Plaintiffs' properties were specifically identified as being in need of rezoning, but appropriate for low to medium density multi-family development. (App. at pp. 295-298, 301).

In 2012, the City Council approved an amendment to the *Central District Plan*'s future land use map to show Plaintiffs' properties as appropriate for single-family and duplex residential for parts of the property (Lots A, C and D). (App. at p. 297).

In December 2012, City staff initiated a rezoning of Plaintiffs' properties consistent with the changes made to the Central District Plan map. (Return to the Writ (CVCV075457), pp. 2-7). The Iowa City Planning and Zoning Commission considered the proposed rezonings and recommended the City Council approve them. (Return to Writ (CVCV075457), pp. 9-29). The City Council set a public hearing, held the public hearing, and took the required three readings of the rezoning ordinance. (Return to Writ (CVCV075457), pp. 30-188). On March 19, 2013, the City Council passed and adopted Ordinance No. 13-4518, rezoning portions of Plaintiffs' properties for single-family and duplex residential uses. (App. at pp. 12-19).

ARGUMENT

I. THE DISTRICT COURT CORRECTLY DECIDED NOTHING IN THE *KEMPF* DECISIONS PREVENTED THE CITY FROM REZONING THE SUBJECT PROPERTIES.

A. Preservation of Error.

The City agrees with Plaintiffs' statements that error has been preserved on the issue of whether the district court erred in granting the City's motion for summary judgment and denying Plaintiffs' motion.

B. Scope and Standard of Review.

The City also agrees with Plaintiffs' statement that the district court's summary judgment ruling is reviewed for the correction of errors at law. "If the conflict in the record concerns only the legal consequences flowing from undisputed facts, entry of summary judgment is proper." *Thompson v. City of Des Moines*, 564 N.W.2d 839, 841 (Iowa 1997).

C. Argument.

The district court correctly rejected all of Plaintiffs' arguments for why the City was allegedly prohibited from rezoning their properties for single-family and duplex residential uses, and correctly granted the City's summary judgment motion for the reasons that follow.

1. Nothing in the Iowa Supreme Court's *Kempf* Decision or the *Kempf* Remand Order Enjoined the City from Rezoning Plaintiffs' Properties.

Plaintiffs' claim that the City's rezoning was illegal rests on their interpretation of the injunction contained in the *Kempf* remand order. Plaintiffs conceded in their resistance to the City's summary judgment motion that "the injunction in the Remand Order does not specifically state that the City may not rezone the Property . . . ." (Plaintiff's Brief in Resistance to Defendant's Motion for Summary Judgment, p. 3 ¶3). Instead, Plaintiffs seek to equate the City's rezoning with "interference" with development that was prohibited by the *Kempf* remand order. The district court refused to interpret either the supreme court or district court *Kempf* rulings in this manner, holding "The Court does not construe *Kempf* and the Supplementary Orders on Remand to mean that the City was prohibited from rezoning Plaintiffs' properties." (App. at p. 179).

A careful reading of the *Kempf* decisions shows that the district court was correct. The Iowa Supreme Court deliberately made a careful distinction in *Kempf* between the City's power to rezone and Kempf's vested development rights--leaving intact the City's ability to rezone. Plaintiffs' interpretation of the *Kempf* remand order is inconsistent with the supreme court's decision (and the remand order) because it eliminates this distinction.

In *Kempf v. City*, the Iowa District Court for Johnson County: a) ruled Kempf had vested rights in his development plans; b) held the City's 1978 rezoning of Kempf's property was void, and c) "restored" the former zoning designation for Kempf's property, which would have allowed his multi-family development. (App. at pp. 256-283).

The City appealed the district court's *Kempf* ruling based on three issues: 1) whether Kempf had overcome the strong presumption of validity of the 1978 zoning ordinances; 2) whether the district court's ruling that the rezoning constituted illegal spot zoning was supported by the record; and 3) whether it was appropriate for the district court to "restore" the prior zoning designation when that designation had been repealed. (App. at p. 284).

On the question of whether the *Kempf* plaintiffs had overcome the presumption of the rezoning's validity, the Iowa Supreme Court ruled that they had. *Kempf*, 402 N.W.2d at 401. On the question of whether the City's 1978 rezoning was illegal spot zoning, the court ruled that it was. *Id.* at 401.

On the question of whether it was appropriate for the district court to "restore" a zoning designation, however, the Iowa Supreme Court ruled it was not. *Id.* at 401. Instead, the supreme court held the City's rezoning of the Kempf property should stand, but that the City could not prohibit Kempf from completing his development plans. *Kempf*, 402 N.W.2d at 40 (holding the City's 1978

rezonings "*may apply to the Kempf property*, provided, however, that *Kempf shall be permitted to proceed with the development of apartment buildings, as shown by the record in this case*, to the extent that such buildings conform to the ordinances in effect prior to the 1978 rezoning. . . . The city shall be enjoined from prohibiting this use of the property by Kempf.") (Emphasis added).

The supreme court further specified that any development beyond Kempf's already-established construction plans must conform to the City's new zoning designations. *Id*. ("Further development or redevelopment of the property beyond that contemplated by Kempf as shown by this record and noted in this opinion, whether carried out by Kempf or future owners, *will be subject to the amended ordinances above designated*."). (Emphasis added). On remand, the district court also plainly anticipated that the Kempf properties would be subject to rezoning like any other property, stating: "once a use has been developed or established on any of the above-described properties, further development or redevelopment of that property *shall be subject to the zoning ordinances in effect at the time* such further development or redevelopment is undertaken." (App. at p. 293).

And in fact, the Kempf properties *were* rezoned in 1983 and 1985 over no legal objections. In 1983 and 1985, during the course of the *Kempf* litigation, the City adopted two zoning ordinances that changed the zoning designations for Plaintiffs' properties. (App. at pp. 306, 308-310, 321-324). The original petitioners

in *Kempf* objected through written correspondences to City Council from their attorney, William Meardon, but did not amend their pleadings to add a cause of action based on these rezonings or file separate suit arising from those rezonings. (App. at pp. 306-307, 311-320, 325-330). Clearly it was not the *Kempf* plaintiffs' intention to permanently enjoin the City from rezoning the subject properties.

The plain language of the *Kempf* orders distinguished between the City's power to rezone and Kempf's vested rights in his development. It did not equate rezoning with "interference," but rather drew a line between "a landowner's right to hold and utilize property against a city's power to change zoning regulations." *Kempf*, 402 N.W.2d at 395. Plaintiffs' interpretation, equating the City's rezoning with illegal interference with development, erases that line, asking this Court to permanently enjoin the City from rezoning their property. Their interpretation is inconsistent with the plain language of the *Kempf* decisions, and fails "to give the injunction as a whole a consistent and reasonable meaning." *Bear v. Iowa Dist. Ct. for Tama Co.*, 540 N.W.2d 439, 441 (Iowa 1995). It was properly rejected by the district court.

2. The District Court Correctly Held Plaintiffs' Request Violates Public Policy.

The district court also correctly held that Plaintiffs' request for a declaratory judgment that the City may not alter the zoning of their properties "violates public policy." (App. at p. 180).

To permanently enjoin the City from rezoning would prevent the City from faithfully performing its zoning powers, as delegated to it by the State of Iowa "for the purpose of promoting the health, safety, morals, or the general welfare of the community." Iowa Code §414.1. The Legislature has also given the City the power to adopt municipal ordinances regarding the manner in which zoning regulations, restrictions and zoning boundaries are determined, established, enforced, and "from time to time amended, supplemented or changed." Iowa Code §414.4.

The Iowa Supreme Court has interpreted a municipality's zoning power "liberally and flexibly," both before the *Kempf* rulings and after. *Neuzil v. City of Iowa City*, 451 N.W.2d 159, 165 (Iowa 1990). Prior to *Kempf*, the Iowa Supreme Court ruled that:

> We are of the opinion the governing body of a municipality may amend its zoning ordinances anytime it deems circumstances and conditions warrant such actions, and such an amendment is valid if the procedural requirements of the statute are followed and it is not unreasonable or capricious nor inconsistent with the spirit and design of the zoning statute. The burden is upon the plaintiffs attacking the amendment to establish that the acts of the council were arbitrary, unreasonable, unjust and out of keeping with the spirit of the zoning statute.

Keller v. City of Council Bluffs, 66 N.W.2d 113, 116-17 (Iowa 1954) (holding city had discretion to amend its zoning ordinance consistent with zoning laws and policies). In *Anderson v. City of Cedar Rapids*, 168 N.W.2d 739 (Iowa 1969), the supreme court declared "courts will not substitute their judgment as to wisdom or

propriety of action by a city or town council, acting reasonably within the scope of its authorized police power, in the enactment of ordinances establishing or revising municipal zones." *Id.* at 742.

The Iowa Supreme Court's support for *Keller* and *Anderson* continued even after the *Kempf* ruling. In *Neuzil v. City*, the supreme court considered a challenge to an Iowa City rezoning ordinance and cited to *Kempf* for its conclusion that a downzoning can arise to a taking. It did not interpret *Kempf* to mean that the court could enjoin the City from rezoning property. Instead it engaged in a lengthy discussion about a municipality's power to rezone, noting that "zoning is not static" and that "a change in conditions sometimes calls for a change in plans." *Neuzil*, 451 N.W.2d at 164 (citing *Stone v. City of Wilton*, 331 N.W.2d 398, 403 (Iowa 1983)). It rejected the "Maryland rule" that only allows property to be rezoned to correct an original error or because of a change in circumstances, reasoning that over time, ideas about development change. The supreme court affirmed that the:

> liberality and flexibility expressed in *Keller* is consistent with the rule that in legislative matters a municipality may not bind its successors. *Hanna v. Rathje*, 171 N.W.2d 876, 880 (Iowa 1969). Such a rule is necessary because city council members are "trustees for the public." *Id.* So the determination of when the public's interest requires a change in zoning must be within the discretion of the municipality. 1 *Anderson*, American Law of Zoning 3d, §4.27 at 291 (1986).

The Iowa Supreme Court has cited to *Kempf* in two other subsequent zoning decisions. *See Gacke v. Pork Xtra, LLC*, 684 N.W.2d 168 (Iowa 2004); *Perkins v. Bd. of Supervisors,* 636 N.W.2d 58 (Iowa 2001). Neither case even discussed enjoining a municipality from rezoning land as a possible remedy.

Other jurisdictions that have considered the courts' power to impose a zoning designation on land have consistently held that to do so would be a violation of the separation of powers. In *Hanna v. City of Chicago*, 382 Ill. App.3d 672 (2008), the court issued a strongly-worded ruling against a petitioner seeking a permanent injunction against the City's power to rezone:

> Courts are ill equipped to determine what the public policy should be. Seldom are all interested parties, all facts, and all issues present in a single case, where the court can rationally balance all the factors necessary to establish a policy good for society. Further, establishing public policy may entail the balancing of political interests. This is a function of the legislature, not the courts.
>
> When the legislature has declared, by law, the public policy of the [s]tate, the judicial department must remain silent, and if a modification or change in such policy is desired the law-making department must be applied to, and not the judiciary, whose function is to declare the law but not to make it. Perpetuating this lawsuit so that Hanna may attempt to elevate his personal zoning policy preferences over Chicago's citizens and their elected officials is not an appropriate use of the judicial system.

Hanna, 382 Ill. App.3d at 681-82 (internal citations omitted); *see also English v. Augusta Township*, 514 N.W.2d 172 (Mich. 1994) (court refused to order that a certain zoning designation be established or enjoin the city from rezoning the land,

but entered an injunction prohibiting the city from interfering with the plaintiff's plans for a mobile home park where the city had engaged in illegal exclusionary zoning); *Rogers v. City of Allen Park*, 463 N.W.2d 431 (Mich. App. 1990) (judicial zoning is contrary to the separation of powers; once the court has declared that an existing zoning classification is unconstitutional, it must then determine the reasonableness of the owners' proposed use); *Williams v. City of San Bruno*, 217 Cal. App.2d 480 (1963) (permanent injunction prohibiting city from rezoning property was improper).

In *Kempf*, the supreme court acknowledged that zoning restrictions are "'subject to reasonable revisions with changing community conditions and needs as they appear,'" *Kempf*, 402 N.W.2d at 399 (quoting *Anderson*, 168 N.W.2d at 742. The *Kempf* court declared the district court violated the separation of powers between the legislative and judicial branches when it ordered that the land be zoned to a particular designation, adopting the Michigan approach to this issue set forth in *Schwartz v. City of Flint*, 395 N.W.2d 678 (1986).

The *Schwartz* court thoroughly analyzed the court's power to declare that a certain zoning designation be applied to property. It stated that:

> Zoning, by its nature, is most uniquely suited to the exercise of the police power because of the value judgments that must be made regarding aesthetics, economics, transportation, health, safety, and a community's aspirations and values in general. By the same token, zoning, which requires line drawing that oftentimes 'by its nature is arbitrary', is uniquely unsuited to the judicial arena.

Id. at 690-93.

Plaintiffs' argument that the City's rezoning equates to "interference" with development under the *Kempf* remand order asked the Court to rezone from the bench by prohibiting the City from exercising its legislative functions. The district court's ruling that their request for declaratory judgment violated public policy was correct.

3. Plaintiffs' True Complaint is that the Iowa City Board of Adjustment, A Body Independent from the City Council, Affirmed the Denial of Their Site Plan.

As Plaintiffs argue in their brief, they allege error in Iowa City Board of Adjustment's decision denying their site plans for apartment buildings because the plans were inconsistent with the City's single-family and duplex zoning. *See* Plaintiff's Brief, p. 20. ("[N]either the zoning official who initially denied TSB's site plans based on [the rezoning], nor the BOA which affirmed the zoning official for the same reason, could have done so without the passage of ordinance 13-4518."). This complaint against the Iowa City Board of Adjustment was the essence of Plaintiffs' motion for summary judgment against the City.

The district court correctly held the Board of Adjustment's actions are irrelevant to the City Council's power to rezone. The Board of Adjustment and City Council are independent bodies. *See* Iowa Code §§414.7 (providing for appointment of a board of adjustment); 414.12 (outlining the powers of a board of

adjustment, which include, "[t]o hear and decide appeals where it is alleged there is error in any . . . decision . . . made by an administrative official in the enforcement of this chapter . . . ."); *Holland v. City Council of Decorah*, 662 N.W.2d 681, 684 (Iowa 2003) (explaining the independence of a board of adjustment to grant exceptions to zoning ordinances of general application).

The fact that the Board of Adjustment applied the new zoning passed by the City Council does not impute that action to the City or invalidate the City's properly enacted zoning. The Board of Adjustment is often applying ordinances passed by the City Council, and Plaintiffs' argument that the City Council's rezoning and the Board of Adjustment's denial of the site plan are one-in-the-same blurs the line between these two independent bodies. This is inconsistent with the statutory scheme in Chapter 414 which provides powers to the Board of Adjustment that cannot be changed by the City Council.

Additionally, the factual and legal issues that were part of Plaintiffs' action against the Board of Adjustment action are irrelevant to the issue of whether the *Kempf* rulings prohibited the City from rezoning. In the Board of Adjustment action, which is currently pending the district court will need to decide the question of whether the Board's 2013 denial of Plaintiffs' site plan violated the *Kempf* orders. In so doing, the court will need to determine whether the Plaintiffs have the development rights they claim under those orders. These issues are not

relevant to the narrow question that was raised by Plaintiffs in the current actions: whether the City had the power to rezone their properties.

The district court made no error of law by denying Plaintiffs' motion for summary judgment and granting the City's motion.

II. THE DISTRICT COURT PROPERLY DISMISSED PLAINTIFFS' ALLEGED TAKINGS CLAIM AS INSUFFICIENTLY PLED.

A. Preservation of Error.

The City disagrees that Plaintiffs preserved error on the issue of whether they pled a takings claim. A takings claim was never properly presented to the district court before the filing of Plaintiffs' Rule 1.904(2) motion, and therefore, error was not preserved on any such alleged claim.

B. Scope and Standard of Review.

"It is well-settled that a party fails to preserve error on new arguments or theories raised for the first time in a posttrial motion." *Mitchell v. Cedar Rapids Comm. Sch. Dist*., 832 N.W.2d 689, 694 (Iowa 2013). The court of appeals has recognized that "the same rationale adheres in the post-summary judgment context." *Spaulding v. Schuerer et al*, 847 N.W.2d 614, 2014 Iowa App. LEXIS 419 No. 3-1155 (Iowa Ct. App. April 16, 2014). A Rule 1.904(2) motion is "essential to preservation of error when a trial court fails to resolve an issue, claim,

defense, or legal theory *properly submitted to it for adjudication*." *State Farm Mut. Auto. Ins. Co. v. Pflibsen*, 350 N.W.2d 202, 206 (Iowa 1984) (emphasis added).

C. Argument.

Plaintiffs here had no basis upon which to request "reconsideration" by the district court, and have not preserved error on the alleged claim, because their assertion of a takings claim was too late. They did not properly plead the claim, and they certainly did not pursue a takings claim over the two year course of this litigation. In both Plaintiffs' declaratory judgment and certiorari petitions, the only relief sought was the invalidation of the City's rezoning:

> Wherefore, Plaintiffs request: a declaratory decree adjudging the Defendant may not alter the zoning of the property, and that if the Defendant does so, that the altered regulation is, to the extent it applies to the property, unconstitutional and void; that the Court enter a temporary injunction restraining Defendant from altering the zoning of the property until a hearing has been held; for such other relief as the Court deems just and equitable; and the costs of this action.

(App. at p. 137).

> Wherefore, Plaintiff prays that a writ of certiorari issue herein, and that on hearing thereof the Defendant's rezoning of the property be annulled and declared void.

(App. at p. 162).

Notice pleading does not provide Plaintiffs' the freedom they claim to change the nature of their action after summary judgment was decided against them. While a "taking" was included in a list of reasons for the illegality of the

rezoning, no other aspects of the declaratory judgment or certiorari petition suggested a takings claim. In neither petition was there reference to any provision of the U.S. Constitution. *See Bakken v. Council Bluffs*, 470 N.W.2d 34, 36 (Iowa 1991) (discussing legal underpinnings of a regulatory taking claim). In neither petition was there reference to any provision of the Iowa Constitution. In neither petition were the words "damages" or "diminution of value." In fact, as Plaintiffs point out in their appellate brief, the first time Plaintiffs' raised the issue of damages *during litigation* was in their Rule 1.904(2) motion, wherein they attached a letter they had provided to the City in 2012. *See Stew-Mc Dev., Inc. v. Fischer*, 770 N.W.2d 839, 848 (Iowa 2009) (stating "mere mention of a subject in a petition for declaratory action does not open the door to resolution of any and all hypothetical issues" and denying plaintiffs' expanded request for relief when it was not the issue "truly litigated by the parties.").

The issues "truly litigated" by the parties here involved the City's power to rezone, not an alleged taking. Plaintiffs designated no experts in anticipation of a takings trial; neither did the City. Neither party took any depositions. Both parties filed motions for summary judgment - not motions for *partial* summary judgment. Plaintiffs took the position that the case could be resolved on summary judgment:

> TSB filed the pending Declaratory Judgment action and Petition for Writ of Certiorari challenging the legality of the City's actions. TSB files this Motion for Summary Judgment. As shown in the Statement of Undisputed Material Facts and Brief filed herewith, there exist no

> genuine issues of material fact for trial, and TSB is entitled to the relief it seeks as a matter of law.

(App. at p. 247). Plaintiff's summary judgment brief contains no legal argument regarding a takings claim. The "conclusion" of Plaintiffs' summary judgment brief stated as follows: "TSB asks the Court to declare the City's rezoning of the property to be null, void and of no force and effect. TSB asks the Court to enter a ruling affirming its right to construct apartment buildings . . . ." (Plaintiffs' Summary Judgment Brief, p. 14 ¶2). As recognized by the Court, the Plaintiffs and the City agreed to continue the original trial date so that the Court could determine "whether the matter could be disposed of on summary judgment." (App. at p. 334). If Plaintiffs planned on having a takings trial after summary judgment proceedings, it was to be a trial by ambush.

The notice pleading cases cited by Plaintiffs are inapposite. In *American Family Mut. Ins. Co. v. Allied,* 562 N.W.2d 159 (Iowa 1997), the contribution issue was raised by the Plaintiff during summary judgment proceedings, where it was dismissed by the district court as insufficiently pled. *Am. Family*, 562 N.W.2d at 163. Here, Plaintiffs took no action on their alleged takings claim until *after* the district court filed its summary judgment rulings. In *Lee v. State*, 844 N.W.2d 668 (Iowa 2014), the supreme court held that the allegedly unpled prayer for relief, reinstatement to employment, was tried by the consent of the parties. *Lee*, 844 N.W.2d at 679-80. Unlike *Lee*, there was no litigation whatsoever of a takings

claim in this case. Allowing such a claim under the general equitable prayer for relief does not "fairly conform to the case made by the petition and the evidence." *Lee*, 844 N.W.2d at 679 (internal citations omitted).

Plaintiffs never properly pled or litigated a takings claim. The district court therefore correctly denied Plaintiffs' attempt to expand the scope of their action after summary judgment was entered against them, as Plaintiffs' Rule 1.904(2) motion was in effect an extremely belated motion to amend. Error was not preserved on an alleged takings claim because it was never properly submitted to the district court, and alternatively the district court's dismissal of Plaintiffs' alleged taking claim should be affirmed.

CONCLUSION

The district court correctly found no illegality in Iowa City's rezoning of Plaintiffs' properties. Nothing in the *Kempf* rulings expressly or impliedly prohibited the City from rezoning; on the contrary, the *Kempf* rulings actually anticipated that the City would rezone Plaintiffs' properties. The district court's grant of summary judgment to the City on this issue was correct.

Additionally, Plaintiffs failed to preserve error on an alleged takings claim. The district court correctly held that Plaintiffs failed to sufficiently plead the claim; Plaintiffs did not litigate the claim; and Plaintiffs improperly raised the claim for the first time in their post-summary judgment Rule 1.904(2) motion.

The district court's conclusion that no genuine issues of material fact remained for trial and that the City was entitled to judgment as a matter of law was correct and should be affirmed in its entirety.

STATEMENT REGARDING ORAL ARGUMENT

The City does not request oral argument. However, should the Court grant Appellant's request for the same, the City respectfully requests to be heard at such time.

Respectfully submitted,

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*/s/ Elizabeth J. Craig*_____
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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on February 5, 2016, I electronically filed the foregoing Final Brief of Defendant-Appellee City of Iowa City with the Clerk of the Iowa Supreme Court by using the EDMS system.

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*/s/ Elizabeth J. Craig*_____
Elizabeth J. Craig